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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91165596
Party	Defendant Heisman Winners Association, LLC Heisman Winners Association, LLC 9002 Chancellor Row, Suite 1000 Dallas, TX 75247
Correspondence Address	Kourtney Mulcahy Hinshaw & Culbertson LLP Suite 300 222 North LaSalle Chicago, IL 60601
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Kourtney Mulcahy
Filer's e-mail	kmulcahy@hinshawlaw.com
Signature	/Kourtney Mulcahy/
Date	07/10/2006
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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THE HEISMAN TROPHY TRUST,	:	
	:	
Opposer,	:	
	:	Opposition No.: 91165596
v.	:	
	:	Serial No.: 76/545,073
HEISMAN WINNERS ASSOCIATION, LLC,	:	
	:	
Applicant.	:	
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**APPLICANT’S MOTION FOR INVOLUNTARY DISMISSAL FOR OPPOSER’S  
FAILURE TO TAKE TESTIMONY**

NOW COMES Applicant, HEISMAN WINNERS ASSOCIATION, LLC (hereinafter the “Applicant”), by and through its attorneys, Alan R. Lipton and Kourtney A. Mulcahy of the law firm Hinshaw & Culbertson, LLP, and for its Motion for Involuntary Dismissal for Opposer ‘s Failure to Take Testimony, and states as follows:

**I. PROCEDURAL HISTORY**

On September 16, 2003, the Applicant filed United States Trademark Application, Serial No. 76/545,073 (hereinafter “the ‘073 Application”) seeking registration for its HWA design mark for “clothing, namely jerseys and hats” in International Class 25, and “sports memorabilia, namely resin figurines, bobble heads, and collectible football helmets” in International Class 28. The ‘073 Application was published for opposition on April 19, 2005. The Heisman Trophy Trust (hereinafter the ‘Opposer”) filed a Notice of Opposition on June 20, 2005. The United States Patent and Trademark Office Trademark Trial and Appeal Board (hereinafter the “TTAB”) sent notice of the Trust’s opposition, as well as the discovery and trial schedule, to the

Applicant's counsel on June 20, 2005. The Applicant timely filed its Answer and Affirmative Defense on July 27, 2005.

Originally, the TTAB set the discovery period to open on July 10, 2005 and close on January 06, 2006. The 30-day testimony period for party in position of plaintiff was originally set to close on April 06, 2006. On November 03, 2005, the Applicant filed its Motion for an Order Compelling Answers to Interrogatories to Opposer, and its Motion to Test the Sufficiency of Response to Admission Request. The TTAB suspended proceedings pending the disposition of the Applicant's Motion to Compel and Motion to Test Sufficiency of Responses to Requests for Admission on November 17, 2005. The TTAB reset the discovery and trial dates and ordered the proceedings resumed on January 18, 2006. The new discovery close date was set for March 24, 2006. Significantly, the Opposer's 30-day testimony period was set to close June 22, 2006. The Opposer did not take any testimony or offer **any** other evidence in support of its position during this 30 day testimony period.

## **II. STANDARD FOR JUDGMENT FOR OPPOSER 'S FAILURE TO TAKE TESTIMONY**

Section 534.01 of the TTAB Manual of Procedure allows for a motion for judgment against a Plaintiff where the Plaintiff fails to prove his case. TM Trial & App. Bd. Man. of Proc. § 534.01. As listed under Section 534.01, 37 CFR § 2.132(a) allows for involuntary dismissal of an opposition for the failure to take testimony where:

the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute.

37 CFR § 2.132(a). The purpose of the motion under 37 CFR § 2.132(a) is to save the defendant the expense and delay of continuing with the trial in cases where the plaintiff has

failed to offer any evidence during its testimony period. *See Litton Bus. Sys., Inc. v. J. G. Furniture Co. Inc.*, 190 USPQ 428, *recon. denied*, 190 USPQ 431 (TTAB 1976). In those cases where plaintiff did, in fact, fail to offer any evidence during its testimony period, plaintiff cannot prevail and, thus, defendant need not offer evidence. *See, e.g., Hester Indus. Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645, 1645-46 (TTAB 1987); *Pfaltzgraf v. William Davies Co. Inc.*, 175 USPQ 620 (TTAB 1972).

### **III. THE APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL SHOULD BE GRANTED**

The Opposer's 30-day testimony period closed on June 22, 2006. Opposer has failed to take any testimony, or to offer any other evidence, in support of its claims that it will be damaged by Applicant's registration of the HWA design mark. Applicant has timely brought this motion pursuant to Section 534.01 of the TTAB Manual of Procedure. *See* 37 CFR § 2.123(a) and (c) (requiring that a motion for judgment for plaintiff's failure to prove case must be filed before the opening of the testimony period of the moving party). Applicant may prevail in this matter, even if it does not offer any evidence either. *See Hester Indus. Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645, 1645-46 (TTAB 1987); *Pfaltzgraf v. William Davies Co. Inc.*, 175 USPQ 620 (TTAB 1972). Thus, Applicant's motion should be granted to save it the expense and delay of continuing with a trial that the Opposer cannot win. *See Litton Bus. Sys., Inc. v. J. G. Furniture Co. Inc.*, 190 USPQ 428, *recon. denied*, 190 USPQ 431 (TTAB 1976).

WHEREFORE, Applicant, HEISMAN WINNERS ASSOCIATION, LLC respectfully requests that the Board enter judgment in its favor, and against the Opposer, and grant the Applicant such other and further relief as the Board deems just and equitable.

Respectfully Submitted,

HEISMAN WINNERS ASSOCIATION, LLC

By: /Kourtney A. Mulcahy/  
One of their attorneys

Alan R. Lipton  
Kourtney A. Mulcahy  
Hinshaw & Culbertson LLP  
222 North LaSalle Street, Suite 300  
Chicago, Illinois 60601  
(312) 704-3000